SUPREME COURT, U. S.
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No. 660

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

Board of Education of Central School District No. 1 Towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselear County and Chatham, Columbia County and Board of Education of Union Free School District No. 3, Towns of North Hempstead and Oyster Bay, Nassau County, New York,

Appellants,

v.

James E. Allen, Jr. as Commissioner of Education of the State of New York,

Appellee,

and

Michael Rock, Anthony Divileski, Peter Girzone, Doreen Beaudin, Charles Haigh and Barbara Brennan,

Intervenor-Appellees

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

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BRIEF OF PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Protestants and Other Americans United for Separation of Church and State is a nonprofit, educational corporation organized under the laws of the District of Columbia and is a national organization of over 100,000 members interested in the preservation of civil rights arising from the constitutional principle of separation of church and state and the preservation of religious liberty as guaranteed under the religious clauses of the state and federal constitutions. "Americans United" and many of its members have suits pending in various courts seeking redress for alleged infringements against their constitutional right as citizens and taxpayers to be free of "establishment."

STATUTE INVOLVED

Sec. 701, Subdivision 3 of the New York Education Law, as amended L. 1965, C. 320, § 2; L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, 701.3.

THE QUESTION PRESENTED

Whether Sec. 701.3 of the New York Education Law, insofar as it provides for the purchase of textbooks with public moneys to be lent to pupils enrolled in grades 7 to 12 of chruch-related schools violates the establishment or free exercise clauses of the First Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

The Board of Education of the Central School District No. 1, towns of East Greenbush, Nassau, Schodack, Sand Lake and North Greenbush, Rensselaer County and Chatham Columbia County, and the Board of Education of Union Free School District No. 3, towns of North Hempstead and Oyster Bay, Nassau County, New York, commenced this action in the Supreme Court of the State of New York for Albany

County on April 29, 1966. The relief sought in the amended complaint was a judgment declaring Sec. 701.3 of the New York Education Law, insofar as it provides for the purchase of textbooks with public moneys to be made available free to pupils attending church-related schools, to be a violation of Article XI, Sec. 3, of the New York State Constitution and the religious clauses of the First Amendment to the United States Constitution.

The plaintiffs ask that the defendant be enjoined from implementing the law with regard to textbooks for church school students. The plaintiffs, as members of boards of education, are concerned since Secs. 306 and 1706 of the Education Law provide that any member of a school board who fails to comply with any section of the Education Law is subject to removal from office by the commissioner of education, and further that the commissioner of education may withhold public moneys from any school district whose school board fails to comply with any section of the Education Law. The plaintiffs believe that Sec. 701.3 of the New York Education Law for the purchase of textbooks at public expense for use by pupils enrolled in church-related schools would violate both the state and federal constitutions which they are sworn to uphold. Failure to purchase the textbooks and distribute them to pupils at church-related schools would subject them to dismissal from office and threaten their school district with the loss of state funds. The plaintiffs filed suit to clarify the law and protect their livelihood and their school districts.

Justice T. Paul Kane of the Supreme Court of the State of New York for Albany County held the statutory provisions to be unconstitutional (51 Misc. 2d 297, 273 N.Y.S.2d 239). In the New York State Supreme Court, Appellate Division, Third Judicial Circuit, Justice J. Clarence Herlihy held that the plaintiffs had no "standing" or "status" to bring the action. Two justices concurred in the result but decided the appeal on the merits. (27 A.D.2d 69, 276 N.Y.S.2d 234) Finally, on appeal to the highest court of

New York, the State of New York Court of Appeals, Justice Scileppi reached the merits of the case and held that the legislation in question did not violate either the state or federal constitutions. (20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791)

SUMMARY OF ARGUMENT

Religious liberty and freedom of worship are two important fundamentals of the American way of life protected by the Constitution of the United States as interpreted by this court. These principles are not to be subverted by slight-of-word tricks of legislative draftsmen. Our written Constitution is a blueprint on which the foundations of our intricate and successful society is thoughtfully based. There is no room for laws which while giving the appearance of conformity with the basic constitutional design, in fact, result in a destructive undermining of the whole structure. Sec. 701 Subdivision 3 of the New York Education Law while dressed up with a false facade of constitutionality inevitably results in the eroding away of the guarantees of freedom from establishment and freedom of worship found in the religious clauses of the First Amendment to the United States Constitution. Whatever the motive, or the stated purpose of the Act, it results in direct aid to church-related schools in carrying out their educational function by furnishing books at public expense, heretofore often furnished at church expense, to students at church-related schools. A state law having this effect violates the religious clauses of the First Amendment to the United States Constitution and is a step towards the establishment of religion at the expense of the taxpayer no matter how cleverly written.

Robert G. Dixon, Jr., in his informative article "*Religion, Schools and the Open Society*" (13 Journal of Public Law, No. 2, p. 306 (1965)) points up the grave impact on the American way of life involved in efforts to bring state and federal support to churches and their schools. Insofar as the "American way of life" is structured in rights of the

individual by the Bill of Rights of the federal constitution individuals have a right to seek protection of those rights in this court and this court has a duty to protect the individuals as well as the society as a whole.

> "The great threat to continuation of the separation of the church and state tradition, and the open society values which are vitally associated with it, lies not in such things as recitation or nonrecitation of prayers in public schools, religious observances in their public place, or exemption from some public norm or duty on ground of religion. The threat lies rather in a disposition toward self-segregation, and in claims for public support, on the part of sectarians. A society in which there are schools, scout troops, and youth or welfare organizations existing simply as such, without special identification or division, is one kind of society. A quite different kind of society results if these same components, or a substantial percentage of them, become self-consciously hyphenated and take on an identity as a Roman Catholic school, a Lutheran scout troup, or a Jewish welfare program. We do not want the psychology and philosophy of Quebec to spread sectionally and cross-sectionally across all American life and institutions. An oppressed minority can be expected to stick together and to ghettoize because of external pressure and nonacceptance. Persistence in such practices after there has been a flowering both of numbers and acceptance is to violate the moral command of Kant's categorical imperative. It is to pursue a policy which, if pursued by all, would result in the destruction of the open and common society we have known." (p. 306)

ARGUMENT

The Establishment Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment forbids a State from employing its facilities or funds in a way that gives any church greater strength in our society than it would have by relying on its followers.

The subdivision of the Education Law of New York, the constitutionality of which is under question in this litigation, provides that a state board of education and similar public bodies:

> ". . . shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text books . . ."

The plaintiffs, certain boards of education in New York State, seek a judgment declaring the above-mentioned portion of the law unconstitutional and a restraint on its implementation by defendant. The defendant commissioner moved to dismiss the complaint on several grounds. Amicus restricts its argument to the validity of the statute on First Amendment grounds.

It is clear that the statute results in the lending of school textbooks to pupils at church-related schools. No other result can be expected unless this court finds that under the federal constitution the applicability of the statute is limited to public and private schools which are not church related, or which do not have as a purpose the advancement of religion. So limited there is no constitutional objection to the statutory plan.

Amicus doubts that the legislators had any but church-related schools in mind, but this court can assume that the act was written with the religious clauses of the federal constitution in mind. Such being assumed, the act cannot be interpreted to permit the lending of textbooks at public

expense to church-related schools so as to aid such schools in carrying on their educational task. It is the basic plan of our constitutional government that religious education is beyond the power of the federal and state governments. Religious education is permitted, perhaps even encouraged, but the direction and financing of such efforts are the sole prerogative of the churches or religiously motivated persons whose faiths are involved.

This court has been articulate in clarifying the meaning of the religious clauses of the First Amendment which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." (Amendment 1 - U. S. Constitution). This court has stated that the "great liberties insured by the First Article" occupy "a preferred position in our basic scheme." *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944).

If one is to assume the "integrity" of the legislature which adopted the act in question, then one must accept the premise that the legislators did not mean to legislate contrary to the restrictions of their state and the federal constitutions. The legislators took an oath to abide by these constitutions. One must assume that they meant to live up to this obligation and that therefore the act which they adopted does not mean to provide for furnishing textbooks at public expense so as to assist church-related schools in carrying on their educational functions. One should read Section 1 of Chapter 320 of the Laws of 1965 (New York) as follows:

> "It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense, and the general welfare of the state [leaving to religious groups the carrying out of religious education programs which are important to God]". Material in brackets supplied - (N. Y. Sess. Laws 1965, c 320, § 1).

This reading of policy would be consistent, beyond any doubt or argument, with the oath of office of the drafters.

In keeping with the declaration of a policy which reads in the constitutional mandates and limitations of the state and federal constitutions, Education Law § 701, subd. 3 then would permit the appropriate school authorities:

> ". . . to purchase and to loan upon individual request to all children . . . who are enrolled in grades seven to twelve of a public or [secular] private school which complies with the compulsory education law, textbooks. Textbooks loaned to children enrolled in grades seven to twelve of said [secular] private schools shall be textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees, or other [public] school authorities. Such textbooks are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other [public] school authorities." Material in brackets supplied.

Read, with the constitutional limitations spelled out, the act in question would be consistent with the limitations on state action in the field of religion to be found in the religious clauses of the First Amendment.

No one will argue today but that the First Amendment's mandate against establishment of religion has been made applicable to the states by the Fourteenth Amendment. Mr. Justice Clark in *School District of Abington Tp. Pa. v. Schempp*, 374 U.S. 208 (1963), clearly outlined the findings of this court on the law of a case such as this:

> "Twenty-three years ago in *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940), this Court, through Mr. Justice Roberts, said:
>
> 'The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First

Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.'

Second, this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost 20 years ago in Everson, supra, 330 U.S., at 15, 67 S.Ct., at 511, 91 L.Ed. 711, the Court said that '[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.' And Mr. Justice Jackson, dissenting, agreed:

'There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. * * * This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity.' Id., 330 U.S., at 26, 67 S.Ct., at 516, 91 L.Ed. 711.'

Further, Mr. Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, declared:

'The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.' Id., 330 U.S., at 31-32, 67 S.Ct., at 519, 91 L.Ed. 711.

The same conclusion has been firmly maintained ever since that time, see Illinois ex rel. McCollum, supra,

333 U.S., at pp. 210-211, 68 S.Ct., at pp. 464-465, 92 L.Ed. 648; *McGowan v. Maryland*, supra, 366 U.S., at 442-443, 81 S.Ct., at 1113-1114, 6 L.Ed. 2d 393; *Torcaso v. Watkins*, supra, 367 U.S., at 492, 81 S.Ct., at 1682-1683, 1684, 6 L.Ed. 2d 982; and we reaffirm it now." (pp. 215-217)

In 1947, the Supreme Court of the United States set forth in *Everson v. Board of Education*, 330 U.S. 1 (1947), the minimum scope or meaning of the establishment clause of the First Amendment as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'." (pp. 15-16)

The establishment clause of the Bill of Rights was based upon the awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand and on the belief that a union of government and religion tends to destroy government and degrade religion. *Engel v. Vitale*, 370 U.S. 421.

It would be more realistic to accept that the New York State legislators, in adopting the legislation in question, have

as a purpose a desire to aid Roman Catholic parochial schools to educate children so as to relate to God. Such an objective is so dear to the hearts of God-fearing Christians of the Roman Catholic persuasion that it is conceivable that they would put their religious convictions above constitutional limitations. In addition, such an objective might persuade some legislators to stretch the words of the Constitution to cover their good intentions. Recently, in Michigan, Representative Thomas L. Brown (R-Lansing) is quoted in the *Grand Rapids Press*, February 14, 1968 in connection with a "nonpublic school aid bill," that it is "stretching pretty close to the constitutional line" separating church and state. "But we'll leave that up to the courts to decide." When legislators give up the practice of calling "church-related schools" "non public schools" the credibility gap will be substantially narrowed. Till then the fig leaf of jesuitical legislative draftsmanship must be lifted to identify the sects involved.

The limitations of the religious clauses of the First Amendment were not designed to protect the society from the neutral but from the religiously dedicated. The "credibility gap" which strains our contemporary society results as often from the carelessness of those who would do "good" as from the malevolence of those who would do "bad." No matter how one feels about the motives of the legislators or how concealed in guile is the purpose of the legislation, the primary effect of this legislation is to aid church-related schools in carrying out their religious educational functions. Without this aid some students might have left the church schools to attend public schools. But public schools are also designed to aid children. Assuming that public schools are performing their task of educating children the only loss would be to church schools, not to the pupils, for the pupils would continue their education in the state schools. This loss of possible aid to religion by taxpayers is the price that churches pay for religious liberty and the right to undertake religious education. It is a modest price for so great a privilege.

There is no reason why this court may not take into consideration the "purpose" and primary effect of the act in question. Mr. Justice Clark in *Schempp* provided a test useful in determining whether or not a statutory enactment withstands the strictures of the establishment clause:

> "The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Abington School District v. Schempp*, 374 U.S. 203, at 222.

In the same case in his concurring opinion Mr. Justice Douglas emphasized:

> "The most effective way to establish any institution is to finance it, and this truth is reflected in the appeals by church groups for public funds to finance their religious schools." Id. at 229.

Mr. Justice Clark's test was amplified by the Justice himself in *Religion and the Law*:

> "The phrase 'respecting the establishment of religion' prohibits situations where the church and state are one; where the church may control the state and vice versa; and where there is some working arrangement between the two . . . Finally, the term includes the furnishing of funds for facilities by the state where the program and primary effect is to advance religion," 15 SC. L. Rev. 855, 859 (1963).

The "rationalization" often relied upon to describe the patently unconstitutional as constitutional in the field of church-state relations is the so-called "child benefit" theory. It argues that if it can be said that government aid is beneficial to the child then aid to a church concurrent with a benefit to a child is not prohibited by the "establishment clause" of the federal constitution. The "child benefit"

theory saw the light of day in Louisiana under the then leadership of Huey Long. Despite a provision in the Louisiana Constitution that "No public funds shall ever be used for the support of any private or sectarian schools," (La. Const. Art. XII, Sec. 13) the Louisiana Legislature provided for textbooks for all students in the state, regardless of the schools attended. (La. Acts (1928), No. 100, 143) When the case, *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), reached this court it did not come on First Amendment grounds but on the Fourteenth Amendment's protection against the taking of private property for public use. This court merely agreed with the opinion of the state court that the statute benefited all the children of the state no matter which school they attended, and that the taxpayer funds used were expended for a public rather than a private purpose.

The next case in which the "child benefit" theory was important was *Everson v. Board of Education*, 330 U.S. 1 (1947). The State of New Jersey authorized the reimbursement of parents for expenses in sending their children to public and church schools. There was no reimbursement or other financial reimbursement to the church school; there was no working arrangement between the church and the state – only between the state and the parents. In these circumstances the court held that it was the child not the state that was aided. While setting forth a comprehensive resume of sound church-state relations, previously quoted, it permitted state reimbursement of the parent for transportation to a parochial school. This gave strength to the "child benefit" argument, which since has been as generously rejected as the sound definition of church-state relations in *Everson* has been accepted (cf. *McCollum v. Board of Education*, 333 U.S. 203 (1948); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

The state supreme courts when faced with the sophistic "child benefit" theory have not been persuaded. The theory is thoroughly discussed in *Dickman v. School District*, 232 Ore. 238, 366 P.2d 533 (1961), which in turn discusses

other leading state cases wherein the argument is rejected – *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002, *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E.2d 576 (1938), and *Mathews v. Quinton*, 362 P.2d 932 (Alaska 1961). The Oregon Supreme Court pointed out in the *Dickman* opinion:

> "This so-called 'child benefit' theory has been applied in other cases in which the expenditure of public funds is made for the purpose of meeting the educational needs of pupils, including those attending parochial schools. The difficulty with this theory is, however, that unless it is qualified in some way it can be used to justify the expenditure of public funds for every educational purpose, because all educational aids are of benefit to the pupil." (pp. 539-540)

The Oregon Court cites Robert F. Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 Ill. L. Rev. 333 (1950), emphasizing: "The difference between providing police protection and providing teachers does not lie in the identity of the beneficiary but in the way the aid is extended." (p. 348)

> "The Constitution, according to the Court, does not forbid all aid to religious institutions. They may receive fire and police protection. What the Constitution forbids is aid to the religious function, and the Court in the *Everson* case divided over the question whether this function was in fact being aided. This being the case, *if a state wished sincerely to protect the safety of its children, it could set up children's busses on which any child could ride, whether going to a parochial school or the movies*. . . . To improve their minds and morals *it could provide free books*, museums and 'libraries.' *These aids would be available to all children regardless of the school they attended*, or whether or not they attended school. The aid would truly be to children (a group which the state may validly aid) irrespective of the religious activity of the individual. . . . *When, however, the state undertakes to aid just pupils and schools it is no*

longer aiding all children and all buildings. . . ." (pp. 348, 349) (Emphasis supplied)

Amicus argues that the so-called "child benefit" theory should be limited to situations where the benefit to the child is genuinely paramount and is not being advanced as a "subterfuge" to evade constitutional strictures against government aid to churches and church-related institutions and that this court should adhere to the "durable First Amendment philosophy" which Mr. Justice Douglas attributed to Justice Rutledge in his concurring opinion in *Engel v. Vitale*, 370 U.S. 421 (1962):

> "There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largess . . . The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting . . . Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. . . . It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. . . . The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve dominate benefit; or all will embroil the state in their dissensions." (p. 444)

CONCLUSION

For the reasons stated, Amicus respectfully prays this court to reverse the decision of the court below and grant the relief sought by the appellants.

Respectfully submitted,

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